IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

MICHAEL WAYNE REYNOLDS, Defendant below, Appellant, vs. MICHAEL SHAHAN, Director of DIVISION OF MOTOR VEHICLES, Plaintiff below, Appellee.	: : : : : : : : : : : : :	C.A. NO. 2004-11-072

Submitted: March 16, 2009

Decided: March 16, 2009

On appeal from Division of Motor Vehicles

Affirmed.

Andre M. Beauregard, Esquire, Brady, Richardson, Beauregard & Chasanov, P.O. Drawer B, Rehoboth Beach, Delaware 19971, Attorney for Appellant.

Frederick Schranck, Esquire, Department of Transportation, Post Office Box 778, Dover, Delaware 19903-0778, Attorney for Appellee.

Trader, J.

In this civil appeal from the Division of Motor Vehicles Department of Public Safety, I hold that there was probable cause to arrest the defendant while being in actual physical control of his motor vehicle while under the influence of intoxicating liquor. I further hold that the State has established by a preponderance of the evidence that the defendant was in actual physical control of the motor vehicle while under the influence of alcohol. Since the decision of the hearing officer is supported by substantial evidence, I affirm her decision.

The Facts

On February 23, 2004, Corporal Lafferty was dispatched to a domestic incident on County Route 463 north of County Route 451, Sussex County, Delaware. Upon arrival at the scene, he observed the defendant behind the steering wheel of a Ford truck and the motor vehicle was in his yard stuck up to the frame. The motor was running, the car was in reverse and the rear tires were spinning. The vehicle was being pulled out by the landlord who had a John Deere tractor with a tow chain hooked to the back bumper of the vehicle. Both vehicles were in motion as the landlord tried to pull the truck out of the hole.

Cpl. Lafferty asked the defendant to exit his vehicle and the defendant staggered when he stepped out of the vehicle. The defendant staggered and swayed so much that Cpl. Lafferty had to hold him to keep him from falling. The defendant's eyes were red and bloodshot and he had a strong odor of an alcoholic beverage on his breath. The defendant refused all field tests at the scene and later at the police station. At the police station the defendant submitted to the intoxilyzer test and the blood alcohol concentration (BAC) was .259 per cent of alcohol in the defendant's blood.

At the administrative hearing the defendant did not object to the results of the chemical test. The only contention raised by the defendant at the hearing was whether the defendant was in actual physical control of the motor vehicle.

The Standard of Review

The scope of review of an appeal from the Division of Motor Vehicles is limited to correcting errors of law and determining whether substantial record exists to support the findings of fact and conclusions of law. *Eskridge v. Voshell*, 593 A.2d 589 (Del. 1981). "The findings of fact will not be overturned on an appeal as long as they are 'sufficiently supported by the record and the products of an orderly and logical deductive process.'" *Eskridge, supra* (quoting *Levitt v. Bouvier*, Del. Super., 287 A.2d 671,673 (Del. Super. Ct. 1972). If there is substantial evidence in the record, "the court may not reweigh and substitute its own judgment" for that of the agency. *Janaman v. New Castle County Board of Adjustment,* 364 A.2d 1241, 1242 (Del. Super. Ct. 1976).

"When the facts have been established, the hearing officer's evaluation of the legal significance may be scrutinized upon appeal." *Voshell v. Attix*, 574 A.2d 264 (Del. 1990), 1990 WL 40028 at * 2. "The Division's understanding of what transpired is entitled to deference, since the hearing officer is in the best position to evaluate the credibility of witnesses and probative value of real evidence." *Id.*

The Scope of the Hearing

The first issue for the hearing officer to address is whether the police officer had probable cause to believe that the defendant was under the influence of alcohol while in actual physical control of the motor vehicle. Under 21 *Del. C*. §2742(f)(1) a police officer has probable cause to believe that a person is in actual physical control of a motor

vehicle while under the influence of alcohol when the officer possesses information which would warrant a reasonable man to believe such a crime has been committed.

> To establish probable cause, the police are only required to present facts which suggest, when *those facts* are viewed under the totality of the circumstances, that there is a fair probability the defendant has committed a crime . . . The possibility that there may be hypothetically innocent explanation for each of the several facts revealed during the course of an investigation does not preclude a determination that probable cause exists for an arrest. *State. v. Maxwell*, 624 A.2d 929-30 (Del. 1993).

"Probable cause can be established by the officer's own observation or from hearsay." *Malone v. Voshell,* Del.Super. 1993 WL 489452 at *2 (Oct. 4, 1993) Herlihy. J. Based on the strong smell of alcohol on the defendant's breath, the defendant's staggering and swaying when he left his truck, the police officer supporting the defendant as he staggered, his red and bloodshot eyes, and the refusal to take the field tests, the hearing officer was correct in finding that there was probable cause to arrest the defendant for having a vehicle in his actual physical control while under the influence of alcohol.

The second issue for the hearing officer to determine is whether the Division has established by a preponderance of the evidence that the defendant was in actual physical control of a motor vehicle while under the influence of alcohol. The facts that supported probable cause as well as the BAC reading of .259 supports the hearing officer's conclusion that the defendant was in actual physical control of a motor while under the influence of alcohol.

Defendant's Contentions

The defendant first contends that the defendant was not in actual physical control of his motor vehicle citing *Bodner v. State,* 752 A.2d 1169 (Del. 2000). The defendant's

contention is incorrect. In *Bodner*, the Supreme Court reversed the decision of the Superior Court and remanded the case for a new trial because the presiding judge erroneously instructed the jury on actual physical control. He failed to instruct the jury that they may consider the fact that the vehicle may be inoperable, and "if inoperable whether the vehicle might have been rendered operable without too much difficulty so as to be a danger to persons and property." *Id.* at 1174.

The issue of actual physical control of a motor vehicle is an issue for the trier of fact. In this case, the hearing officer found that the defendant was in actual physical control of the motor vehicle. She based her findings on the fact that the defendant's vehicle was in motion, he was behind the steering wheel of the vehicle, the wheels were spinning, and the motor was running. I determine that the hearing officer's finding as to actual physical control is supported by substantial evidence.

The defendant raises a variety of contentions on appeal not raised before the hearing officer. He contends that the administration hearing should be reversed because of improper venue, failure to introduce calibration logs, as well as the intoxilyzer card, lack of evidence of the certification of the police officer to perform the chemical test, and lack of evidence that the chemical test was given within four hours of the time the defendant was in control of the motor vehicle. All of these contentions are rejected by the Court.

The only contention raised in the Administrative hearing was whether the vehicle was inoperable so that the defendant was not in actual physical control of the vehicle. Those issues not raised or argued before the hearing officer cannot be considered by the reviewing court. Additionally, the defendant did not object to the introduction of the

BAC test into evidence. Therefore, any contentions now raised in connection with the BAC test on appeal are waived by the failure to object to the BAC test before the hearing officer.

I conclude that there is substantial evidence in the record to support the findings of the hearing officer. Therefore, the hearing officer's decision to revoke the license of the defendant is affirmed.

IT IS SO ORDERED.

Merrill C. Trader
Judge